No. 3123

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

This is a suit in equity to quiet the title to a placer mining claim, brought by appellees under Sec. 1307 of the Compiled Laws of Alaska (Carter's Code, Sec. 475). That section reads as follows:

"Sec. 1307. Any person in possession, by himself or his tenant, of real property, may maintain an

action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

It sufficiently appears from the pleadings that during the year 1916 the appellants, defendants below, claimed some kind of interest in said placer claim, for it is alleged and admitted that on April 4, 1917, said defendants below, by their agent, filed for record in the appropriate recording district an affidavit of assessment work for the year 1916 (paragraph VII of the Complaint, paragraph V of the Answer, Tr. pp. 4-6, 11). April 4th is the 94th day of the year.

So far as pertinent here, section 7 of Chapter 10 of the Session Laws of Alaska for 1915 reads as follows:

> "Section 7. In order to hold a claim or claims after the annual assessment work has been done thereon, the owner of such claim or claims, or some other person having knowledge of the facts, shall make and file an affidavit of the performance of such assessment work with the Recorder of the district in which such claim or claims is or are located, not later than ninety (90) days after the close of the calendar year in which such work was done, or the improvements made, which affidavit shall set forth the following:
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> * * * * * *
>
> "The failure to file for record the proof of assessment work as herein provided, shall be deemed an abandonment of the location and the claim shall be subject to relocation by any other person, provided, however, that a compliance with the provisions of this section before any

> relocation, shall operate to save the rights of the original locator, and further provided, that if said placer claim or claims have not been relocated by any other person or persons within one year after such forfeiture, the last locator, claimant or owner of such forfeited claim may return to said forfeited claim or claims and relocate the same as though the same had never been located."

The complaint alleges relocation of the claim by plaintiff Umphrey on April 1, 1917, the 91st day of the year (Tr. pp. 1-2), and the recording of notice of relocation by him on April 2 (Tr. pp. 2-3), and the subsequent transfer of an interest in the claim to plaintiff Harrison (Tr. p. 3), and that plaintiffs were in possession at the time of bringing the suit, and that defendants claim some interest in the claim adverse to the plaintiffs (Tr. p. 4).

The answer of defendants admits the filing of said notice of relocation by Umphrey and that the said affidavit of assessment work was not filed until the 94th day of the year. Their affirmative answer does not controvert the title or possession of plaintiffs at the time of bringing the suit, but merely alleges that at the time of filing the answer, which was several months later—the time from May 3 to August 28 (Tr. pp. 8, 13), the defendants were "the owners in fee" and in possession of the land.

The reply denies the allegations of the "affirmative answer" (Tr. p. 13).

Although the case was set for trial no trial was had, for the plaintiffs moved for judgment on the

pleadings and the court granted the motion (Tr. pp. 17-20).

ARGUMENT

So far as setting of the trial on the forenoon of September 22, 1917, for the afternoon of the same day is concerned, no harm whatever to appellants occurred therefrom. *No trial was had.* Hence, even if it would have been an abuse of discretion to force appellants to trial on such short notice, there was no prejudicial error, for, after setting the case for trial, the Court decided to entertain a motion for judgment on the pleadings, made by appellees, and the case was disposed of on that motion, not by trial (see Judgment and Bill of Exceptions, Tr. pp. 14-15, 19).

The same considerations apply to the overruling of appellants' motion to postpone the trial. The case was set for trial in the forenoon. At the opening of the afternoon session appellants made their motion (Tr. pp. 21-22) to postpone the trial "for a period of three weeks," etc., which motion the Court denied (Tr. p. 19). But since no trial was had, the denial of the motion did not prejudice appellants in the least degree, even if it were true that they would have been prejudiced by said denial thereof if the case had gone to trial. In the mere denial of the motion there was no intrinsic harm to appellants: such harm could result only if the denial thereof were followed by a trial.

Hence the questions of setting the case for trial

and of refusing appellants' motion to postpone trial, are out of the case, for those acts of the Court, if error at all, were absolutely harmless error.

The only question in the case, therefore, as we submit, is whether the judgment on the pleadings is sustainable.

The Affirmative Answer, Though Denied by the Reply, Raises No Material Issue.

Defendants' so-called affirmative answer (Tr. p. 12) is wholly defective in that it does not purport to challenge the plaintiffs' title or possession as of the time of the commencement of the action, but only as of the time of filing the answer, namely, August 28, 1917. Viewed by itself, it therefore admits that at the time the action was begun the defendants had no title or possession, and does not deny that plaintiffs had title and possession when the action was commenced. It simply avers that the defendants "are" the owners, etc. In *Leggatt v. Stewart,* 2 Pac. (Mont.) 320, the affirmative defense was in the following words:

> "Defendants aver the facts to be that at the commencement of plaintiffs' said action, and long prior thereto, these defendants were, ever since have been, and now are, the owners of the premises described in plaintiffs' said complaint, and every part thereof, and in the possession of, and entitled to the possession of, the same."

The Court said of this defense:

> "These allegations of new matter are ambiguous and uncertain, for the reason that it is impossible to ascertain therefrom whether the

> pleader intends to aver that the defendants were in possession at the date of the commencement of the action or at the time of the filing of their answer. Hence, it follows that the instruction to the jury, that it was admitted in the pleadings that the plaintiffs were in possession of the premises at the commencement of the action, was correct."

In the case at bar there is not even an ambiguity in regard to what is intended to be alleged, for the affirmative answer clearly refers to the time of filing the answer and to no other.

To put the plaintiffs to their proof of title and possession the defendants should have set up the *nature* of their alleged claim or title. In *Wall v. Magnes,* 30 Pac. (Colo.) 56, the statute was in every essential particular like the Alaska statute. And the Court said (p. 57):

> "If defendant be not asserting an adverse claim, there is nothing to try. The language of the statute requiring plaintiff to be in possession is no more emphatic and mandatory than is that requiring the existence of an alleged conflicting interest. The statutory proceeding is in this respect unlike the action of ejectment; if defendant does not assert an adverse interest in himself, he cannot be permitted to put plaintiff upon proof of his possession and title. It is sufficient if, after pleading possession and ownership by plaintiff, the complaint aver generally that defendant claims some adverse estate or interest, and that such claim is unfounded. *Ely v. Railroad Co.,* 129 U. S. 291, 9 Sup. Ct. Rept. 293. It is for defendant, if he relies upon an adverse interest, *to plead its nature by answer.* And plaintiff is entitled to the judgment of the

Court upon demurrer as to whether defendant's interest thus pleaded has any foundation in law. *Railroad Co. v. Oyler,* 60 Ind. 383. When defendant has shown by his answer that he asserts such an adverse interest, legal or equitable, as, if sustained by proof, *might entitle him to relief* in connection with the property, *then, and not till then,* is he in position under the statute to try the issue of plaintiff's possession and ownership."

Speaking of suits to quiet title, Pomeroy says, Remedies and Remedial Rights (2nd Ed.), §369:

"The action has, however, been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this connection the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted *against* him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, *assert their titles,* and have the controversy put to rest in a single judgment."

And 32 Cyc. 1360 says:

'It has been held that in statutory proceedings to determine adverse claims, defendant relying on an adverse claim in himself *must, as a condition precedent to the right to try the issue of plaintiff's possession, plead the nature of his claim.*"

In *Lambert v. Shumway,* 85 Pac. (Colo.) 89, as in the case at bar, there were in the first part of the

answer admissions and denials of the allegations of the complaint, and the second part of the answer was, as here, an insufficient affirmative defense. The Court said:

> "The questions discussed in the briefs are as to the sufficiency of defendant's defense, and as to whether or not it was necessary for the plaintiff to prove possession in order to maintain the action. Appellant contends that plaintiff was not entitled to judgment, because the proof does not show that he was in possession of the premises, and that his being in possession is a jurisdictional matter. While plaintiff, to maintain the action, must *aver* his possession coupled with title, the duty is devolved upon defendant of asserting an adverse interest in himself and specifying its nature, *and before he can put plaintiff upon proof touching his possession and title he must plead accordingly.* * * * Defendant has not done this. The first alleged defense consists merely of denials and admissions. This defense, *standing alone, is not sufficient to put in issue the possession of plaintiff,* because, as was said in the case of *Wall v. Magnes, supra,* before defendant can put plaintiff upon proof touching his possession and title, he must plead an adverse interest in himself. The defendant may plead as many defenses to the cause of action alleged in plaintiff's complaint as he desires, but each of these defenses must be complete in itself and must be tested by its own allegations. * * * The first defense neither alleges title nor possession in the defendant.
>
> "The second defense of defendant fails, because," etc.
>
> "The second defense failing, the denial of plaintiff's possession in the first defense is not sufficient to put plaintiff upon proof touching the same."

Hence the so-called affirmative answer of defendants is defective (1) for failure to allege that defendants *had* a title when the action was begun, and (2) for failure to set out the *nature* of the title relied on. And, as the authorities just quoted hold, unless the nature of a defendant's title, as of the time when the suit was brought, is disclosed, so as to show that he has a right to compel the plaintiff to *prove* his own title and possession, the plaintiff is not compellable to put in any proof. It follows that if the defendant fails to make such disclosure and if the complaint sufficiently alleges title and possession in the plaintiff, the plaintiff is entitled to judgment on the pleadings. That was the situation in the case at bar.

The Pleadings, Construed Together, Amount to an Admission of at Least Constructive Possession in Plaintiffs, and That Is a Sufficient Basis on Which to Maintain This Action.

Even if the authorities did not require the defendant to plead specifically his own title, in order to put plaintiff to his proof—even if the denials in an answer were sufficient for that purpose—still the pleadings in this action amount, on the whole, to an admission of possession in the plaintiffs, and possession alone is a sufficient basis on which to found the action.

Though the defendants deny the allegations of possession made in the complaint, yet they admit the filing of plaintiffs' notice of location, and also admit that they, defendants, filed an affidavit of labor four days too late. They, therefore, admit

that their own title, if they had any before April 1, 1917, was forfeited on the latter date by force of the Alaska statute. The pleadings, all taken together, may thus be construed as an admission that the plaintiffs had at least constructive possession when the action was brought. And it has been held that possession alone, without a showing of title, is sufficient to support this character of action under a statute in all essentials like the Alaska statute regarding suits to determine adverse claims. Thus, in *Merced Mining Co. v. Fremont,* 7 Cal. 317, 68 Am. Dec. 262, it is said:

> "In reference to the first point, the two hundred and fifty-fourth section of the practice act provides that 'an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.'
>
> "The language of this section is general and comprehensive, and allows any person 'in possession' to bring the action against any person 'who claims' an estate or 'interest' adverse to him. The only title the plaintiff is required to have is that which flows *prima facie* from possession. It has been repeatedly decided by this Court that possession was *prima facie* evidence of title * * *. This provision of the statute is founded upon evident reasons of justice and policy, and is more especially applicable to the present condition of the country."—A condition then prevailing in California which was very similar in many particulars to that now existing in Alaska.

One claiming by right of possession only can maintain the action.

Foss v. Dam, 1 Alaska 346.

In *Gavigan v. Crary,* 2 Alaska 370, 378, the Court said:

> "Plaintiffs were in possession of the real property. Crary claimed an estate therein adverse to them. They brought this 'action of an equitable nature against [Crary], who claims an estate or interest therein adverse to [them], for the purpose of determining such claim, estate, or interest.' Unless Crary is found to have a 'claim, estate or interest' in the property of a higher nature—a better title—than plaintiffs' possessory rights, plaintiffs' titles must be quieted by the decree of this Court."

And see:

Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30, 34;
Curtis v. Sutter, 15 Cal. 259;
Head v. Fordyce, 17 Cal. 149.

Citing the *Pralus* case and the *Merced Mining Company* case, Pomeroy says, 4 Eq. Juris. (3rd Ed.), §1397, note:

> "A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States."

It is respectfully submitted that the judgment of the lower Court should be affirmed.

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